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SUPREME COURT NO. 96344-4  
CONSOLIDATED W/ 96345-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL BIENHOFF,

Co-Respondent / Co-Cross Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass North, Judge

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SUPPLEMENTAL BRIEF OF CO-RESPONDENT / CO-CROSS  
PETITIONER

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A. ISSUES ON REVIEW

1. It is error to inform the venire in a murder prosecution that conviction will not result in the death penalty.<sup>1</sup> Should this Court affirm reversal of Bienhoff's conviction based on violation of this rule?

2. Is reversal of Bienhoff's conviction warranted because denial of his motion for a mistrial after it was revealed he would not face the death penalty constitutes an abuse of discretion by the trial court?

3. Is reversal of Bienhoff's conviction warranted based on the dismissal of an African-American juror in violation of Batson?<sup>2</sup>

4. Should Bienhoff's conviction be reversed because the trial court failing to instruct the reconstituted jury to begin deliberation anew as required by Lamar?<sup>3</sup>

B. STATEMENT OF THE CASE

1. Violation of *Townsend/Hicks*.

On the first day of voir dire, the prosecutor asked how the court would respond if a juror asked if it was "a death penalty case." 1RP 405. The court said it has "sort of evaded the question" in the past. 1RP 406.

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<sup>1</sup> See e.g., State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008) and State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001).

<sup>2</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

<sup>3</sup> State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014).

The prosecution stated it preferred to address such questions “head on,” by informing jurors the “state Supreme Court has decided that that is not something that they are privy to, or we cannot tell them if this is a death penalty case or not,” and then follow up that admonishment by asking, “does that cause you concern as to whether or not you could be a fair and/or impartial juror in this case.” 1RP 406. The court balked at the proposed follow-up question and no final resolution was reached. 1RP 406-07.

During voir dire the prosecutor informed the venire the jury would be tasked with determining guilt or innocence but would have no role in deciding punishment. 1RP 824-25. The prosecutor then asked,

. . . Does that make sense? Do you guys all understand that? Everyone is nodding their head.

Are you okay with it? Everybody in the jury box seems to be nodding their head.

Anybody have a concern about that or think that doesn't make sense? Anybody? No one?

What about over here? Everyone okay with that? Does that cause you any concern about being a juror in this case where the charge is murder in the first degree? Anybody?

1RP 825. In response to the prosecutor's questions, a juror asked whether Washington used the death penalty. 1RP 825. The prosecutor deferred to the trial court. The court said it could not say whether the death penalty

might apply. 1RP 825-26. The prosecutor then fielded several death penalty related questions.

During this discussion, Juror No. 20 asked if jurors who knew how the death penalty worked in Washington could explain it to others. The prosecutor deferred to the court. The court replied, “I don’t know how to answer that question, because the Washington Supreme Court’s decision I find very difficult, so I can’t – I don’t know what to say about that.” 1RP 830. No definitive answer was provided.

At break, Bienhoff moved for a mistrial, arguing the prosecution was “attempting to death-qualify” the panel, noting the prosecution goaded jurors into raising the death penalty issue and then used it to figure out which were pro or anti-death penalty. 1RP 838-39, 845. Pierce joined in the motion, noting the venire must realize the death penalty was not in play because it had been revealed to them it involves a bifurcated process, one to determine guilt and another to determine whether to impose death. 1RP 844. Because the venire knew the jury would only determine guilt, it knew the death penalty was not a possible punishment. Id.

The court denied the motion, finding it was a juror who introduced the death penalty into the discussion, not the prosecution. 1RP 846.

2. Violation of *Batson*.

Juror 6 was the only African-American panelist in the jury box at the outset of voir dire. RP 1015. Juror 6 expressed concern serving as a juror without knowing a guilty verdict could result in the death penalty or a life sentence. RP 827-28, 833, 872-76. During private voir dire Juror 6 was asked by the defense, “do you really think that you would be not able to be fair and impartial?” Juror 6 replied:

I think that my views -- I think that my views can be fair, and I think that they can be impartial. I am very hesitant about making a decision that would weigh that heavily upon somebody's life, but I feel that I am capable of making a fair and impartial decision.

RP 878 (emphasis added). The trial court subsequently asked Juror 6:

The issue obviously is whether you can do your job as a juror or not. And that's what we are trying to determine, because before the break, it sounded like you were saying that you couldn't, and that's what we are trying to figure out. It's can you -- under those circumstances, can you do the job of a juror, which is to decide has the State proven its case beyond a reasonable doubt or not[?]

RP 881. Juror 6 responded that she did not “know how to answer it. I really don't. I don't know that - - I don't - - I'm not sure.” Id. The court denied the prosecution request to dismiss her for cause. RP 882.

Thereafter, over defense objection, the prosecutor exercised a peremptory challenge to strike Juror 6 and overcame a Batson challenge.

RP 1014-20. The prosecutor gave four specific reasons for striking Juror 6, which are set forth in argument section 2, infra. RP 1016-19.

The trial court summarily accepted the prosecution's stated reasons, concluding, "The State clearly has nondiscriminatory reasons for exercising its peremptory challenge against Juror Number 6." RP 1020.

3. Violation of *Lamar*.

After closing argument, the alternate jurors were instructed;

Thank you very much for your careful attention to the case. It won't be necessary for you to serve further. Please don't discuss the case with anyone or indicate how you would have voted until the jury returns its verdict.

RP 3898. The trial court did not instruct the alternates that they might be recalled for service and did not admonish them not to research the law or facts until the verdict was reached. The only requirement imposed by the court was that they not "discuss the case with anyone or indicate how [they] would have voted" until a verdict was reached. RP 3898.

After excusing the alternates, the Court informed the jury;

So, ladies and gentlemen, the case is now in your hands. If you will retire to the jury room, the bailiff will bring you the exhibits, though we'll probably do that on Monday because we're at the end of the day today, and I understand you're not coming in tomorrow, and then you will be able to commence your deliberations.

RP 3898. The court did not tell jurors they could not discuss the case until the exhibits were brought into the jury room, or otherwise admonish

jurors not to begin deliberations once in the jury room. The following Monday jurors spent one hour and 40 minutes in the jury room while the court considered a motion to excuse Juror 5. RP 3900-28; CP<sup>4</sup> 175-79, 229-99. Jurors were never told not to deliberate.

At almost ten o'clock, the court summoned the jurors from the jury room, including the two alternates, and advised them Juror 5 would be replaced by an alternate:<sup>5</sup>

THE COURT: So, ladies and gentlemen, I have decided to excuse Juror Number 5 from further service in this case.

...

So what I want to do . . . is have our second alternative, Mr. Nevegold, fill in on the jury.

Ms. Swanagan, I still want you to not talk about the case with anyone or indicate how you would have voted in case we need to have you as an alternate.

But if the 12 of you, including Mr. Nevegold, would retire to the jury room, then the bailiff will bring you the exhibits, and you can commence your deliberations.

RP 3928-29. Bienhoff was found guilty as charged. CP 475; RP 3939.

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<sup>4</sup> This "CP" cite refers to the Clerk's Paper index numbers established for co-defendant Pierce's appeal.

<sup>5</sup> The court excused juror 5 for the appearance of impropriety after defense counsel witnessed the juror spending significant time with a courtroom spectator and appearing to act surreptitiously. CP 175-79; RP 3924.

C. ARGUMENTS

1. VIOLATION OF *TOWNSEND/HICKS* WARRANTS REVERSAL.

"The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Thus, in a first-degree murder case it is error to tell jurors the death penalty is not involved. Hicks, 163 Wn.2d at 481; Townsend, 142 Wn.2d at 846-47. This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. "[I]f jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id. at 847.

Here, the prosecution violated the prohibition by goading jurors into asking whether the death penalty applied, and then eliciting responses that made clear the death penalty was not a potential penalty. RP 825-38. The trial court also abused its discretion in failing to recognize the violation, by contributing to the violation and by denying the defense motion for a mistrial. 1RP 846.

“[I]n response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.” Hicks, 163 Wn.2d at 487. Bienhoff’s court did not do so, however, and instead informed jurors the State’s highest court had precluded it from informing them whether the death penalty was in play. 1RP 825-26.

This error was exacerbated by subsequent voir dire. First, the court failed to admonish Juror No. 20 not to inform his fellow jurors about his knowledge of death penalty proceedings. 1RP 830. The court then informed jurors that once it rendered a verdict, the jury’s duties would be complete, and it would be the court’s responsibility to impose punishment. 1RP 836-37. As Pierce’s counsel noted, there were jurors in the venire who knew the death penalty cases are bifurcated and having been told they would only engage in the guilt phase of trial, they must realize the death penalty is not in play. 1RP 844. But even if Juror 20 had not passed on what he knew to others, the trial court made it clear for jurors that the death penalty requires a bifurcated process. 1RP 871-72, 883, 887.

The Court of Appeals correctly found the prosecutor committed misconduct by eliciting a discussion about the death penalty:

We conclude that the prosecutor's repeated questioning of the potential jurors prior to the discussion of the death penalty constituted prosecutorial misconduct, and that the trial court abused its discretion in failing to curtail the prosecutor's line of questioning.

The record reveals that the potential jurors indicated that they understood the prosecutor's description of the jury's role and did not have follow up questions. But the prosecutor nonetheless elicited a discussion of the death penalty through his repeated questioning of the jury's understanding and recitation of the charges against Pierce and Bienhoff. He did so despite being aware of the Washington Supreme Court's position that the jury must not be told whether the death penalty is possible in any given case. Therefore, the prosecutor's elicitation of a discussion on the death penalty constituted improper conduct sufficient to support a claim of prosecutorial misconduct.

State v. Bienhoff, 2018 WL 4062779, at \*7–8 (Slip Op. filed Aug. 27, 2018) (emphasis added), review granted, 432 P.3d 820 (2019).

This Court can affirm on alternative grounds to those employed by the Court of Appeals. State v. Easterling, 159 Wn.2d 203, 211, 149 P.3d 366, 370 (2006). Thus, even if this Court concludes the prosecutor's questioning of the venire does not rise to the level of misconduct, it should still affirm based on the trial court abuse of discretion in handling the penalty discussion and by denying a mistrial.

Bienhoff's claimed the trial court also violated the prohibition and then abused its discretion by denying Bienhoff's motion for a mistrial, the Court of Appeals disagreed. It concluded the trial court correctly told the jury "that they would determine whether Bienhoff was guilty, but not his sentence if he was convicted." Bienhoff, 2018 WL 4062779, at \*5. It also reasoned that the trial court did not inform the jurors "the death penalty

was not at issue,” despite acknowledging the court also revealed a death penalty case involves a bifurcated process and Bienhoff’s jury would not face that process if it chose to convict. Id.

The Court of Appeals erred in its analysis. The trial court informed the jury a death penalty case involves a “bifurcated proceedings” and then also informed the venire that the only role of the current jury would be to determine guilt. Given this information, it is difficult to see how jurors could not have understood the death penalty was not at issue as a result of the court’s comments. They were told they were there only to determine guilt. Thus, they were no going to be subjected to “bifurcated proceeding” and would not decide whether to sentence Bienhoff to death.

Bienhoff suffered prejudice as a result. There is a reasonable probability knowing the death penalty was not a punishment option affected the jury’s verdict. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Had Bienhoff’s jurors not known if the death penalty was in play, they may have been more discriminating in viewing the evidence, set the beyond a reasonable doubt burden at a higher level, and enforced the

presumption of innocence to its fullest, which would have created a better chance of acquittal, or at least a hung jury. Townsend, 142 Wn.2d at 847.

Although there was no doubt Bienhoff was involved in Reed's death, who was culpable for that death was not an easy question. There was ample evidence Reed introduced the gun instead of Bienhoff, and that it was Bibb who fired numerous .45 caliber rounds at the scene instead of Pierce. Evidence of Bienhoff's guilt was far from overwhelming.

Knowing Bienhoff would not be put to death if convicted, there is a reasonable probability at least some jurors decided to convict because there was evidence supporting his guilt, Reed had died, and someone should be punished. Each deliberating juror's decision to convict was made easier by the prosecutor's misconduct and the trial court's abuse of discretion in handling the Townsend/Hicks issue during voir dire. This Court should therefore affirm the reversal of Bienhoff's conviction.

Both the Prosecution and Pierce argue this Court should overrule the Townsend/Hicks prohibition. The prosecution claims it creates unwarranted confusion for trial courts, prosecutors and criminal defense attorneys. See Prosecutor Petition for Review at 15-18; Pierce's Answer to Petition for Review at 22. Bienhoff agrees it may be appropriate to remove the "strict prohibition" aspect of the rule in light of how it has been applied in the past, but it should not be eliminated altogether.

Since at least 1960, in Washington “[t]he question of the sentence to be imposed by the court is never a proper issue for the jury’s deliberation, except in capital cases.” State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999, 1002 (1960). But this Court has never reversed a conviction for violation of this rule. See e.g., State v. Clark, 187 Wn.2d 641, 654, 389 P.3d 462, 469 (2017)<sup>6</sup>; State v. Hicks, 163 Wn.2d 477, 487–88, 181 P.3d 831, 836 (2008)<sup>7</sup>; State v. Townsend, 142 Wn.2d 838, 843–49, 15 P.3d 145, 150 (2001)<sup>8</sup>; see also, State v. Rafay, 168 Wn. App. 734, 780–81, 285 P.3d 83, 108 (2012), review denied, 176 Wn.2d 1023 (2013).<sup>9</sup> In Clark, Hicks and Townsend, this Court upheld the prohibition and applied it to find deficient performance by defense counsel but did not reverse due to lack of proof of prejudice. See notes 7-9, supra.

In Rafay, the Court of Appeals concluded there can be a strategic defense basis to allow jurors to know the death penalty is not at issue. See

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<sup>6</sup> Defense counsel’s failure to object to prosecutor informing venire it was not seeking death penalty in a premediated first degree murder prosecution may have been deficient performance, but reversal not warranted because no showing of prejudice.

<sup>7</sup> Defense counsel revealing death penalty not at issue and not objecting when the prosecutor did the same was deficient performance, but no showing of prejudice because the jury did not convict for aggravated first degree murder.

<sup>8</sup> Failure to object to court and prosecutor revealing the death penalty was not at issue in first degree murder prosecution was deficient performance, but no prejudice shown.

<sup>9</sup> Reversal not warranted when “defense counsel made a deliberate and considered legitimate and strategic choice to disclose to jurors the fact that the defendants were not subject to the death penalty. This decision conceivably facilitated not only the complex assessment of potential jurors but also the pursuit of specific defense theories and objectives during trial.”

note 10, supra. This Court denied review, thereby at least implying it may agree with the Rafay court carving an exception to the rule to allow the defense to waive it for strategic reasons. Bienhoff agrees this is appropriate because it leaves the decision up to the defense, thereby removing it from the “strict prohibition” category.

Unlike in Clark, Hicks, Townsend and Rafay, here the issue does not arise in the context of ineffective assistance of counsel. Rather, both defense attorneys<sup>10</sup> sought to avoid any discussion of the potential punishment that might follow a conviction. 1RP 838-39, 844-45.

The prosecutor committed misconduct by eliciting a discussion of the death penalty and the trial court abused its discretion in denying the defense motion for a mistrial based on the prosecutor’s misconduct. This Court should affirm the reversal of Bienhoff’s conviction.

## 2. VIOLATION OF *BATSON* WARRANTS REVERSAL.

Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. Batson v. Kentucky, 476 U.S. 79, 87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Equal Protection Clause prohibits purposeful discrimination in the selection of juries, regardless of the race of the defendant. E.g., Georgia v. McCollum,

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<sup>10</sup> Bienhoff initially sought to have the jury informed he was facing life without the possibility of parole, but when that was denied, his counsel sought to exclude any mention of punishment. CP 178-91; 1RP 269-74, 838-39.

505 U.S. 42, 47-49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). An individual juror has “the right not to be excluded from one [particular jury] on account of race,” and thus “the Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race.” Powers v. Ohio, 449 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).<sup>11</sup>

Courts employ a three-part test to determine if the State improperly used a peremptory challenge to exclude a potential juror based on race, whether real or perceived. Saintcalle, 178 Wn.2d at 42. First, the defendant must demonstrate a prima facie case of purposeful discrimination “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” Id. (quoting Batson, 476 U.S.

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<sup>11</sup> “Our democracy is based on respect for the rule of law. When we are unable to resolve our disputes amicably by ourselves, we go to court and accept the judgment of our peers even when we do not like the outcome. This system works only if we all believe it is fair. If people are excluded from jury service because of color or creed, we risk eroding faith in the justice of our democracy.” State v. Meredith, 178 Wn.2d 180, 188, 306 P.3d 942 (2013) (González, J. dissenting).

at 93-94). Next, the State bears the burden of providing a race-neutral explanation for seeking to remove the juror from the venire. Id. The prosecutor must give a “clear and reasonably specific” explanation of his or her reasons for striking the relevant juror. Miller-El, 545 U.S. at 239. Third, the trial court must determine “Whether “an objective observer could view race [or ethnicity] as a factor in the use of the peremptory challenge.” State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467, 480 (2018) (quoting GR 37(e)). In deciding whether a peremptory challenge violates equal protection, the court should consider all relevant evidence, and not simply accept the State’s race-neutral explanation. Batson, 476 U.S. at 97-98; Miller-El, 545 U.S. at 240. If the State proffers pretextual reasons for the excusal, an inference of racial discrimination arises. Saintcalle, 178 Wn.2d at 43.

The court must conduct a comparative juror analysis to ascertain whether the State’s proffered reasons for striking an African-American juror were pretextual. Saintcalle, 178 Wn.2d at 43 (citing Miller-El, 545 U.S. at 241; Reed v. Quarterman, 555 F.3d 364, 379 (5th Cir. 2009)). Our courts “do not allow prosecutors to go fishing for race-neutral reasons” to excuse a juror “and then hide behind the legitimate reasons they do find.” Saintcalle, 178 Wn.2d at 43.

On April 24, 2018, this Court adopted General Rule 37 (GR 37) regarding jury selection. It provides a list of presumptively invalid reasons for exercising a peremptory challenge against a person of color. They include:

- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (vi) receiving state benefits; and
- (vii) not being a native English speaker.

GR 37(h).

It also provides a list of reasons “historically . . . associated with improper discrimination in jury selection in Washington State” which should be rejected absent prior notice and subsequent corroboration. These include “allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.” GR 37(i).

Here, the prosecution listed four reasons for striking Juror 6:

(1) she said she could not comply with her jury duties absent knowing if conviction could lead to the death penalty or life sentence. RP 1016-17.

(2) she “paused” before answering whether she could give the prosecution a fair trial. RP 1018.

(3) her brother was convicted of attempted murder, assaulted by police in the past and was treated unfairly by the justice system. RP 1018-19.

(4) her brother’s experience in being prosecuted “left a bad taste in her mouth.” RP 1019.

The trial court analysis of the issue consisted of the following;

Well, I will allow the State to exercise its peremptory in that fashion. I find that it’s not a violation of Battson [sic]. The State clearly has nondiscriminatory reasons for exercising it peremptory challenge . . .

RP 1020.

Although GR 37 was adopted after Bienhoff’s jury was picked and is not retroactive,<sup>12</sup> it provides a framework for assessing the validity of the prosecutor’s reasons for striking Juror 6. It reveals they are presumptively invalid. It is also apparent the trial court failed to assess the reasons stated in light of the entire record and from the standpoint of an “objective observer.”

In Jefferson, this Court applied the “objective observer” standard and reversed the convictions, even though GR 37 was inapplicable. 192 Wn.2d at 229. The same is warranted here.

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<sup>12</sup> Jefferson, 192 Wn.2d at 243.

The reason given that Juror 6's brother was convicted of attempted murder violates GR 37(h)(iii). And the reason given that the prosecution of Juror 6's brother for attempted murder "left a bad taste in her mouth" violates GR 37(h)(ii). Similarly, the prosecutor's reliance on Juror 6's problematic attitude about the death penalty and whether she could be fair to the prosecution implicate GR 37(i), which under the new rule would require advance notice and corroboration. Although GR 37 does not apply here, it highlights the problematic aspects of the prosecutor offered justifications for striking Juror 6.

In addition to the presumptively invalid reasons relied on by the prosecution to strike Juror 6, the trial court failed to properly assess the reasons stated. Specifically, the trial court failed assess record from the standpoint of an "objective observer." Jefferson, 192 Wn.2d at 249.

Instead the trial court simply accepted without meaningful analysis the State's reasons. RP 1020. When analyzed properly, however, it is apparent the striking of Juror 6 by the prosecution violated Batson and its progeny, including Jefferson and the principles embodied in GR 37. Therefore, reversal of Bienhoff's conviction is warranted in light of the Equal Protection Clause violation. Powers v. Ohio, 449 U.S. at 409.

3. VIOLATION OF *LAMAR* WARRANTS REVERSAL.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. As this Court has concluded, it requires they reach that agreement through a completely shared deliberative process, and anything less is insufficient. Lamar, 180 Wn.2d at 585.

Such unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on how to engage in the

constitutionally required deliberative process is constitutional error that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Here, following closing argument the trial court released the alternate jurors from service, but failed to instruct them not to research the case or expose themselves to media accounts. It then recalled one of the alternates to deliberate but failed to inquire if he had conducted any research or been exposed to any outside influences. This was error.

In addition, when the trial court replaced Juror 5 with an alternate, it failed to instruct the reconstituted jury to begin deliberations anew as required under CrR 6.5 and this Court's decision in Lamar. This combination of errors warrants reversal.

During trial the court admonished jurors prior to each weekend recess against conducting any "research" about the case. 1RP 1791, 2070, 2576, 3329. Closing arguments were heard Thursday, October 29, 2015. 1RP 3732-3897. The alternate jurors were then told "[i]t won't be necessary for you to serve further," but they should still not talk about the case with anyone until a verdict was reached. 1RP 3898. The rest of the jurors were instructed to return the following Monday to deliberate. Id. When the parties gathered the following Monday, one of the seated jurors was dismissed, necessitating seating an alternate. 1RP 3924. After the court informed Juror 5 of his dismissal, it summoned the remaining jurors

from the jury room, which included both alternates, informed them of the change, seated one of the alternates, and then sent the reconstituted jury back to the jury room to deliberate. 1RP 3928-29. Three days later the jury returned with guilty verdicts. 1RP 3939.

The trial court's post-closing argument admonishment of the alternate jurors falls far short of that dictated by CrR 6.5 and recommended by under the WPICs. See WPIC 4.69.<sup>13</sup> It failed to ensure the alternates did not conduct research or expose themselves to media accounts about the incident or trial. Nor did the court ask the alternate seated if they had conducted any research or been exposed to any media accounts since being released. There is no basis to find the seated alternate did not engage in such conduct before being seated. State v. Smith, 181 Wn.2d 508, 519 n.13, 334 P.3d 1049 (2014).

Likewise, the failure to instruct the reconstituted jury to begin deliberations anew was reversible error. The jury had been advised they could begin deliberation upon returning to court the following Monday. RP 3898. They were never told not to begin deliberations once they arrived. As such, there is no basis to assume they did not begin deliberating once assembled in the jury room. Id.

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<sup>13</sup> WPIC 4.69 is the recommended instruction to provide an alternate juror who is being "temporarily excused" and advises against talking to anyone about the case, being exposing to media accounts of the case and not to conduct any research on the case.

The problem is the alternates were also in the jury room on Monday morning while the court questioned Juror 5 about his suspicious conduct following closing arguments. See RP 3900-3928 (discussion of Juror 5's conduct and decision to dismiss him). Because jurors were never told not to begin deliberations once they arrived in the jury room, and instead were told they were free to begin deliberation upon returning that Monday, it became imperative to instruct the reconstituted jury began deliberations anew, but it did not.

A jury is "entitled and required to deliberate in private." State v. Cuzick, 11 Wn. App. 539, 543, 524 P.2d 457 (1974), aff'd, 85 Wn.2d at 150. The presence of a stranger, an individual not a member of the 12 person jury, "operate[s] as a restraint upon the proper freedom of action and expression of the 12 jurors who decide the case." Id. at 543-44. "The presence of a person in the room who may not take part in their deliberations is an intrusion upon this privacy and confidentiality and tends to defeat the very purposes of our jury system." Id. at 544.

In Cuzick, an alternate was in the jury room during deliberations. 85 Wn.2d at 147. This Court reversed, holding that regardless of the extent of the alternate juror's participation in deliberations, the alternate juror's presence violated the constitutional concern for jury privacy. Id. at 148-49. "However many persons comprise a jury, there can be no

question that it must reach its decision in private, free from outside influence.” Id. at 149. The Court held a violation is not waived by a defendant’s silence. Id. at 149-50. Finally, the Court held that prejudice is presumed “from a substantial intrusion of an unauthorized person into the jury room unless it affirmatively appears that there was not and could not have been any prejudice.” Id. at 150 (internal quotation omitted).

[T]here is no way of measuring the impact that an outsider might have upon the jury by influencing them with a casual word, gesture or expression.” Cuzick, 11 Wn. App. at 544.

In the delicate process of the jury's deliberations, the presence of an outsider or stranger could be an influence upon the jury in manners that would defy our attempts at defining the potential prejudice. Jurors may be inhibited by the fear that they could not freely deliberate, argue and discuss the case in the confidence of their own group of sworn officers of the court. Furthermore, the 12 jurors responsible for the verdict may be inhibited by fear that an outsider, who does not have such responsibility, will publicly ridicule or otherwise impeach the verdict.

Id.

Here, the two alternates were in the courthouse the morning of November 2, and in the jury room with the 12 deliberating jurors. There is no way to judge what effect it had on deliberations, and the court provided no instruction to begin deliberations anew when the alternate was seated. Cuzick, 85 Wn.2d at 150; Cuzick, 11 Wn. App. at 545. As in Cuzick, this

Court should presume Bienhoff's right to a fair trial by jury was violated. Each of these errors in deliberations compromised Bienhoff's right to an impartial jury, a unanimous verdict and a fair trial. These failures violated Bienhoff's constitutional right to trial by jury and unanimous verdicts under Wash. Const. art. I, §§ 21 & 22, and directly conflicts with this Court's decision in Lamar, and therefore warrants reversal.

4. BIENHOFF ADOPTS BY REFERENCE *MOST* OF THE ARGUMENTS PRESENTED BY CO-RESPONDENT/CROSS-PETITIONER KARL PIERCE.

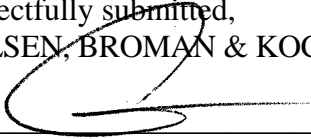
Pursuant to RAP 10.1(g)(2), Bienhoff adopts the arguments set forth in the petition and supplemental brief filed by co-respondent/cross-petitioner Karl Pierce, *except* for his argument that Townsend should be overruled. As argued above, Bienhoff's position is that whether to reveal the death penalty is not a potential punishment upon conviction is a decision best left up to the defense.

D. CONCLUSION

Several errors independently warrant reversal of Bienhoff's conviction. First, the Court of Appeals correctly reversed because of misconduct in voir dire by the prosecutor. But also warranting reversal is the trial court's abuse of discretion in handling the Townsend/Hicks issue, the Equal Protection violation resulting from the prosecutor's striking of Juror 6 in violation of Batson, Jefferson and the principles embodied in GR 37, and the trial court's failure to comply with Lamar.

DATED this 28<sup>th</sup> day of February 2019.

Respectfully submitted,  
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